KL Chan & Assoc (suing as a firm) v Allianz General Insurance (M) Bhd

HIGH COURT (KUALA LUMPUR) — CIVIL SUIT NO 22NCvC-4–01 OF 2013
ROSILAH YOP JC
30 APRIL 2014

Civil Procedure — Limitation — Time — Claim by insured under insurance policy — 'Claim made policy' — Liability repudiated by insurer — Plaintiff settling claim by third party and claiming settlement amount from insurer — Whether insured's claim against insurer time barred — Insurer's liability triggered when claim made against insured during policy period — Limitation Act 1953

Insurance — Claims — Lapse of time — Repudiation of liability — 'Claim made policy' — Claim by insured under insurance policy — Liability repudiated by insurer — Plaintiff settling claim by third party and claiming settlement amount from insurer — Whether insured's claim against insurer time barred — Insurer's liability triggered when claim made against insured during policy period — Limitation Act 1953

The plaintiff was a firm of consulting engineers and the defendant was an insurance company. The plaintiff entered into a contract of insurance with the defendant whereunder the plaintiff was insured from 1 January 2001 to 31 December 2001 with a retroactive date of 1 January 1977. The plaintiff gave official notices to the defendant on 1 March 2001, 20 April 2001 and 7 August 2001 of a pending suit. Later the plaintiff was sued by Aneka Seloka Sdn Bhd ('Aneka') in 2003. The said summons was forwarded to the defendant. The defendants however repudiated liability. The plaintiff proceeded to settle the claim by Aneka by paying a sum of RM730,000. The plaintiff then commenced the present suit against the defendant claiming for the amount paid in settlement and costs incurred in defending Aneka' suit against the plaintiff. The defendant, inter alia, pleaded that the plaintiff's claim was time barred by virtue of the Limitation Act 1953 ('the LA').

Held, dismissing the plaintiff's claim with costs of RM20,000:

(1) The said policy was a 'claim made policy'. A claim made policy means a policy providing coverage that is triggered when a claim is made against the insured during the policy period, regardless of when the wrongful act that gave rise to the claim took place. A retroactive date is applicable to a

claim made policy. In such instances, the wrongful act that gave rise to the claim must have taken place on or after the retroactive date. The claims made policy is a type of coverage trigger that obligates an insurer to defend a claim on an insured's behalf during the period in which the policy is in force. The term 'made' means notification to an insured that a demand for money or services is being requested (see paras 44–45).

(2) The notice of the actual claim made by the third party against the plaintiff was when Aneka sued the plaintiff, which was sometime in the year 2003. The plaintiff served the writ of summons and statement of claim on the defendant on 17 March 2003. The service of the writ of summons and statement of claim on the defendant was on 17 March 2003, which triggered the defendant's liability or obligation to defend the on the plaintiff's behalf. Thus, the cause of action began to run from 17 March 2003 (see paras 46–49).

(3) The plaintiff filed the present tort action against the defendant on 25 January 2013, which was after a period of six years starting from 2003. The plaintiff was thus barred by the LA from claiming against the defendant (see paras 52–53).

[Bahasa Malaysia summary

Plaintif adalah firma pakar runding jurutera dan defendan adalah syarikat insurans. Plaintif memasuki kontrak insurans dengan defendan yang mana plaintif diinsuranskan dari 1 Januari 2001 hingga 31 Disember 2001 dengan diundurkan tarikh 1 Januari 1977. Plaintif memberi notis rasmi kepda defendan pada 1 Mac 2001, 20 April 2001 dan 7 Ogos 2001 tentang guaman yang belum didengar. Plaintif kemudiannya disaman oleh Aneka Seloka Sdn Bhd ('Aneka') pada tahun 2003. Saman tersebut diserahkan kepada defendan. Defendan-defendan walau bagaimanapun enggan membayar liabiliti. Plaintif meneruskan untuk menyelesaikan tuntutan oleh Aneka dengan membayar sejumlah RM730,000. Plaintif kemudiannya memulakan guaman ini terhadap defendan menuntut untuk sejumlah yang dibayar dalam penyelesaian dan kos yang ditanggung untuk membela guaman Aneka terhadap plaintif. Defendan, antara lain, memplid bahawa tuntutan plaintif dihalang masa mengikut Akta Had Masa 1953 ('Akta').

Diputuskan, menolak tuntutan plaintif dengan kos sebanyak RM20,000:

(1) Polisi tersebut adalah 'claim made policy'. Polisi tuntutan dibuat bermaksud polisi memperuntukkan perlindungan yang berbangkit apabila tuntutan dibuat terhadap pihak menginsuranskan semasa tempoh polisi, tanpa menghiraukan apabila tindakan salah yang membuatkan tuntutan dibuat. Tarikh diundurkan adalah diguna pakai kepada polisi tuntutan dibuat. Dalam keadaan ini, tindakan salah yang membangkitkan tuntutan mesti mengambil tempat pada atau selepas

tarikh diundurkan. Polisi tuntutan dibuat adalah sejenis perlindungan yang dicetuskan bahawa mewajibkan syarikat insurans untuk membela tuntutan bagi pihak pengambil insurans semasa tempoh di mana polisi berkuat kuasa. Terma 'made' bermaksud notifikasi kepada pengambil insurans bahawa tuntutan untuk wang atau khidmat sedang dipohon (lihat perenggan 44–45).

(2) Notis tuntutan sebenar yang dibuat oleh pihak ketiga terhadap plaintif adalah apabila Aneka menyaman plaintif, iaitu pada kira-kira pada tahun 2003. Plaintif menyerahkan writ saman dan pernyataan tuntutan ke atas defendan pada 17 Mac 2003. Penyerahan writ saman dan pernyataan tuntutan ke atas defendan pada 17 March 2003, yang mana mencetuskan liabiliti atau tanggungjawab defendan untuk membela bagi pihak plaintif. Oleh itu, kausa tindakan bermula dari 17 Mac 2003 (lihat perenggan 46–49).

(3) Plaintif memfailkan tindakan tort ini terhadap defendan pada 25 Januari 2013, iaitu selepas tempoh enam tahun bermula dari tahun 2003. Plaintif oleh itu dihalang oleh Akta daripada menuntut terhadap defendan (lihat perenggan 52–53).]

Notes

For cases on time, see 2(3) *Mallal's Digest* (4th Ed, 2014 Reissue) paras 5767–5770.

For cases on lapse of time, see 8(1) *Mallal's Digest* (4th Ed, 2013 Reissue) paras 43–44.

Cases referred to

HLB Kidsons (a firm) v Lloyds Underwriters subscribing to Lloyd's Policy No 621/PK1000101 [2008] All ER (D) 40, CA (refd)

Quinn Direct Insurance Ltd v Law Society of England and Wales [2010] EWCA Civ 805, CA (refd)

Legislation referred to

Limitation Act 1953 s 6

Choy Kam Lee (Awtar Kaur with him) (KL Choy & Co) for the plaintiff.
Leslie Bala (SY See with him) (Othman Hashim & Co) for the defendant.

Rosilah Yop JC:

THE PLAINTIFF'S CASE

[1] The plaintiff is a partnership practicing in the name and style of KL Chan & Associates and is a firm of consulting engineers and the defendant is an insurance company.

[2] The defendant offered professional indemnity insurance to the members of the Association of Consulting Engineers. A

[3] The plaintiff entered into a contract of insurance with the defendant under master policy No 01LMT000099 Certificate No 000034. B

(a) the period the plaintiff insured was from 1 January 2001–31 December 2001;

(b) certificate of insurance was issued by the defendant on 23 February 2001. Retroactive date was 1 January 1977. The date of the proposal was 31 October 2000; and C

(c) the limit of indemnity was RM1,000,000 with a deductible RM50,000 for each and every claim.

[4] Pursuant to the contract of insurance the defendant would indemnify the plaintiff against any liability for losses arising from any claim during the period of cover from 1 January 2001–31 December 2001 of any negligence by way of an act, error or omission. D

[5] The plaintiff gave official notices to the defendant on 1 March 2001, 20 April 2001 and 7 August 2001 of a pending suit and also keeps abreast with the defendant what was happening regarding the said suit. E

[6] Later the plaintiff was sued by Aneka Seloka Sdn Bhd vide Summons No 22–4 of 2003 for the sum of RM1,589,984.90 and the said summons was forwarded to the defendant. F

[7] Upon receiving the summons, the defendant solicitors, Messrs Othman Hashim & Co had on 28 March 2003 wrote to the plaintiff informing the plaintiff to engage his own solicitors to defend the claim by Aneka Seloka Sdn Bhd. G

[8] The plaintiff was put to extra expenses, stress and loss when he has to engage his own solicitors to defend the claim by Aneka Seloka Sdn Bhd. Furthermore, the suit even tarnished the reputation and image of the plaintiff. H

[9] The plaintiff avers that he is entitled to reimbursement for the payment of the expenses incurred for engaging his own solicitors to defend the claim. I

[10] The defendant kept quiet while the claim against the plaintiff was proceeding and only on 21 May 2004 did the defendants through its solicitor's repudiated liability of the policy. The plaintiff was misled by the defendant's allegation.

[11] On 23 June 2010 the plaintiff informed the defendant that the claim against Aneka Seloka Sdn Bhd would be resolved and the plaintiff had to pay Aneka Seloka Sdn Bhd RM730,000.

[12] The plaintiff avers that the payment of RM730,000 was after the deduction of the plaintiff's counterclaim of RM21,350. The plaintiff therefore suffered losses in the sum of RM751,350.

[13] The plaintiff also had to pay RM10,218 to Messrs Ooi & Assoc and RM65,950 to Messrs Amin Tan & Co as solicitors fees, RM21,000 to USAINS Holdings Sdn Bhd. The total cost of defending the case against Aneka Seloka Sdn Bhd is RM97,168.

[14] The plaintiff also paid Messrs KL Choy & Co the sum of RM31,300 to take legal suit against the insurance company.

[15] The plaintiff's claim against the defendant is for the said amount paid out by the plaintiff and also the plaintiff claims that he is entitled to be indemnified pursuant to the terms of the policy.

[16] The plaintiff had on 7 May 2010, filed a suit against the defendant at Ipoh High Court vide Writ No 22–116 of 2010. The defendant filed an application against the plaintiff that the suit was premature.

[17] The High Court did not allow the defendant's application, but on appeal the Court of Appeal allowed the defendant's appeal stating the writ of summons filed on 7 May 2010 against the defendant is premature. This was because the settlement agreement between Aneka Seloka Sdn Bhd and the plaintiff only concluded on 22 February 2011.

[18] The plaintiff's claim against the defendant for the loss is RM705,350 (RM751,350 less indemnity RM50,000).

THE DEFENDANT'S CASE

[19] The plaintiff was at all material times the insured in the said policy with the defendant being the insurer.

[20] Prior to the inception of the said policy, the plaintiff had filled up, declared and submitted a proposal form dated 31 October 2000 to the defendant.

[21] The said policy provided insurance coverage to the plaintiff for the period of insurance from 1 January 2001–31 December 2001, with a retroactive date effective 1 January 1977. The said policy limit of indemnity was RM1,000,000 with an excess or deductible of RM50,000.

[22] On 1 March 2001, 20 April 2001 and 7 August 2001, the plaintiff gave notice in writing to the defendant of an impending third party claim against the plaintiff in relation to the said two projects, namely the project at Bandar Pengkalan Indah and at Taman Lapangan Indah.

[23] Shortly after that, the defendant sometime in late 2001, proceeded to appoint a firm of loss adjusters namely McLarens Toplist to investigate the claims and the alleged losses suffered by the third party claimants. The said loss adjusters, after conducting their investigations, produced a final report dated 21 March 2003.

[24] Sometime in the year 2003, the plaintiff was sued by a third party, its principal the developer namely Aneka Seloka Sdn Bhd ('the third party') vide Ipoh High Court Suit No 22–4 of 2003 whereby the said claim is for damages amounting to RM1,589,984.90.

[25] The plaintiff, through their solicitor, Messrs Ooi & Assoc, then forwarded the writ of summons and statement of claim to the defendant on 17 March 2003. The defendant then appointed Messrs Othman Hashim & Co to review and reply to the plaintiff's solicitors and a series of correspondences were exchanged between the solicitors.

[26] After receipt of the loss adjuster's final report, and after obtaining advice from the solicitors, the defendant had on 21 May 2004, repudiated policy liability on the basis that the plaintiff had breached conditions 2.02(2) of the said policy because of non-disclosure of material facts in the proposal form dated 31 October 2000. The defendant's contention was that the plaintiff had prior knowledge of claims or impending claims or intimation of circumstance known which may give rise to a claim against the plaintiff before the inception of the said policy, and that the plaintiff had failed to disclose this in the said proposal form dated 31 October 2000.

[27] The defendant contended that there was discovery of damages/loss since April, 2000 and that the plaintiff, being the consulting engineer, was well aware of this fact. This is evidenced by letters found at pp 343–344 Bundle B. The plaintiff denied the basis of the defendant's repudiation vide their letter dated 9 July 2004.

[28] The facts show that the plaintiff had proceeded to defend the Suit No

22–4 of 2003 on their own. This is despite the fact that the defendant had earlier repudiated policy liability on 21 May 2004. The plaintiff also, on 23 June 2010, took it upon them to inform the defendant that there is likelihood that the plaintiff will accept a proposal to settle the third party's claim out of court.

[29] However, on 6 May 2010, the plaintiff filed a suit against the defendant in the Ipoh High Court in Civil Suit No 22–116 of 2010 whereby the plaintiff claimed indemnity for losses allegedly suffered by virtue of the suit filed by the third party Aneka Seloka Sdn Bhd. This suit was successfully struck off on appeal to the Court of Appeal by the defendant on the basis that the plaintiff's claim was time barred.

[30] On 22 February 2011, the plaintiff and the third party ie Aneka Seloka Sdn Bhd and another party Kontraktor Angkasa Sdn Bhd jointly entered into a settlement agreement for the sum of RM730,000 without the prior approval and written consent of the defendant/insurer.

[31] The plaintiff then filed this present action in the Ipoh High Court vide Suit No 22NCvC-55–03 of 2012. This suit then transferred to the Kuala Lumpur High Court and materialised into the present suit before this court.

AGREED ISSUES TO BE TRIED

(a) whether at all material times the plaintiff is a member of the Association of Consulting Engineers Malaysia;

(b) whether the insured sum of RM1,000,000 is aggregate;

(c) whether the said policy is a 'claim made' policy which provides cover to the plaintiff during the coverage period inclusive of the 'retrospective cover' to 1977 and subject to all the terms, conditions and clauses in the policy inclusive of exclusion 2.02(2);

(d) whether the plaintiff had given the defendant an official notice on 7 August 2001;

(e) whether prior to 7 August 2001, the plaintiff had through various correspondences informed the defendant or its agents or its insurance brokers namely Aon Insurance Brokers (M) Sdn Bhd, in relation to what had happened;

(f) whether the defendant had through its solicitor's letter repudiated liability prior to 21 May 2004;

(g) whether the defendant had appointed a firm of loss adjuster, ie McLarens Young International to investigate the plaintiff's claim;

(h) whether the investigations conducted by McLarens Young International against the plaintiff's claim is true and correct;

(i) whether the plaintiff failed to disclose his knowledge about a claim against him in 2000 when he signed and declared in the proposal form;

(j) whether the plaintiff had breached his duty of good faith under the contract of insurance since the said contract is a contract made in good faith 'uberrimae fidei';

(k) whether the defendant's action in setting aside the insurance contract and the plaintiff's claim is correct;

(l) whether the plaintiff's claim is out of time and whether s 6 of the Limitation Act 1953 is applicable in this case;

(m) whether defendant has to pay indemnity to plaintiff under the said policy;

(n) whether reference made by the defendant to s 6 of the Limitation Act 1953 ('Limitation Act 1953') can be pleaded in this action; and

(o) whether the plaintiff breached cll 2.03(6) and 3.02 of the said policy.

ANALYSIS AND OPINION OF THE COURT

[32] It was the defendant's pleaded defence that the plaintiff's claim is time barred by virtue of the Limitation Act 1953. So it is proper for me to decide on the issue of limitation first before perusing other issues. If the limitation has set in, other issues would be irrelevant for decision.

[33] The plaintiff submitted that the limitation period began to run from 22 February 2011. The terms of the insurance policy are one of indemnity, therefore only when there is a payment by the insured for any claim the defendant would indemnify the plaintiff. The plaintiff further submitted, the indemnity on the liability of the defendant would crystallise when the plaintiff had to pay a third party or became liable. The settlement agreement dated 22 February 2011 proved that the plaintiff's liability was crystallised.

[34] The defendant submitted, the plaintiff's claim against the defendant is time barred. The defendant contends that this is a 'claims made' indemnity policy which means that the defendant's liability made under the said policy is triggered when a demand for compensation is made by a third party against the plaintiff. The relevant clauses in the said policy that evidence these facts are cll 1.03 and 4.02.

[35] It is undisputed that the plaintiff was at all material times the insured in the said policy with the defendant being the insurer.

[36] Clause 1.01 is the operative clause in the said policy which reads:

> The Company agrees subject to the terms, conditions, exclusions and limitations set out in this agreement or hereinafter mentioned or endorsed hereon to indemnify the Insured against liability for losses arising from any claim or claims for compensation (including claimants' costs) first made or notified against any of them and to the Company during the period of cover specified in the Master Policy Schedule by reason of any negligence whether by way of act, error or omission whenever or wherever the same was or may have been committed or omitted or alleged to have been committed or omitted on the part of the Insured when performing their professional duties (as defined herein and referred to in Clause 4.04) as engineers or in any allied professions or committed or alleged to have been committed by the Insured in their professional capacity as engineers or alleged to have been committed by the Insured in their professional capacity as engineers or in any allied professions before they joined the Insured.

[37] Clause 3.03 of the policy provides that:

> 3.03. As a condition precedent to their rights under this Policy the Insured shall give to the Company immediate notice in writing of:
>
> (1) any claim made or notified against them; or
>
> (2) knowledge of circumstances which may give rise to a claim against them; or
>
> (3) the receipt of notice from or information as to any intention by another party to claim against them; or
>
> (4) the discovery of reasonable cause to suspect any dishonest, fraudulent (whether actual or constructive) or malicious act(s) or omission(s) of any of their past or present employees or fellow partners or co-directors, whether giving rise to a claim or not and shall in all case upon request give to the Company such information including where necessary a signed declaration as it may reasonably require to investigate the circumstances and conduct the defence of a claim.

[38] The plaintiff did give notice dated 20 Arpil 2001 (Bundle B p 63) pursuant to cl 3.03 of the policy that they have knowledge of circumstances which may give rise to a claim against them.

[39] In evidence DW2 and DW3 had all confirmed that the said policy is the professional indemnity policy issued to the plaintiff is a 'claims made' policy. In this regard DW2 and DW3 said:

> The said policy issued to the Plaintiff is a 'claims made' policy, whereby the Defendant had, inter alia, agreed to provide insurance coverage to the Plaintiff for liability incurred for loss arising from any claim or claims for compensation made by third parties by reason of any negligence ...

[40] The said policy provides insurance coverage to the plaintiff for the period of insurance from 1 January 2001–31 December 2001, with a retroactive date effective 1 January 1977 involving a professional indemnity insurance scheme. This means that the policy executed by the plaintiff and the defendant was a 'claim made policy'. This fact was never disputed by the plaintiff.

[41] Clause 4.02 defines what is meant by 'claim':

> 'Claim' shall mean the demand for compensation made by a third party against the Insured. Where an act, error or omission results in more than one claim against the Insured which may be the subject of indemnity hereunder, all such claims shall constitute one claim under this Policy.

[42] What is meant by the words 'claim made policy' in a professional indemnity policy was explained in the English Court of Appeal case (involving a professional indemnity insurance scheme), *HLB Kidsons (a firm) v Lloyds Underwriters subscribing to Lloyd's Policy No 621/PK1000101* [2008] All ER (D) 40 Lord Justice Rix's said:

> The essence of a 'claims made' policy is that it provides cover for a claim first brought against the assured during the policy year. As is common with such policies, however, it extends cover to claim first brought against the assured after the policy year provided such claims arise out of circumstances previously notified to the insurers of which the assured became aware during the policy year. The rationale of such policies has been described in *J Rothschild Assurance plc v Collyear* [1999] 1 Lloyd's Rep IR 6 at p 22 and in *Friends Provident Life and Pensions Ltd v Sirius International Insurance Corporation* [2005] Lloyd's Rep IR 135 at p 142.

[43] In *Quinn Direct Insurance Ltd v Law Society of England and Wales* [2010] EWCA Civ 805, the English Court of Appeal applied *HLB Kidsons* (also involving a professional indemnity insurance scheme), described the meaning of a 'claims made' policy as follows:

> Both are a type of insurance known as a 'claims made' policy, that is to say that the risk insured is that for which a claim is made in the period of insurance whenever the damage or its cause arose as explained by Rix J in *J Rothschild Assurance plc v Collyear* [1999] 1 Lloyd's Rep IR 6 and Rix LJ in *HLB Kidsons & Ors v Lloyds Underwriters Subscribing to Policy 621/PKID 001001 and others* [2009] 1 Lloyds LR 8. Thus, both at the inception of the policy and in the period of its operation, the firm must notify the insurer of relevant circumstances, the extent of which may vary according to the terms of the policy. There is no exception to the obligation of disclosure in the case of information subject to a privilege enjoyed by the firm as opposed to its client (see *March Cabaret Club & Casino Ltd v The London Assurance* [1975] 2 Ll LR 169, 177).

[44] So it is clear that a claims made policy means a policy providing coverage that is triggered when a claim is made against the insured during the policy period, regardless of when the wrongful act that gave rise to the claim took place. A retroactive date is applicable to a claims made policy. In such instances, the wrongful act that gave rise to the claim must have taken place on or after the retroactive date.

[45] These claims made policy is a type of coverage trigger that obligates an insurer to defend a claim on an insured's behalf during the period in which the policy is in force. The term 'made' means notification to an insured that a demand for money or services is being requested.

[46] It is settled that a professional indemnity policy with a 'claims made' basis clause, notice of an actual claim by the third party to the plaintiff would then trigger the defendant's liability and put the defendant at risk.

[47] After scrutinising all the evidence in the present case, it is my considered view that the notice of the actual claim made by the third party against the plaintiff is when Aneka Seloka Sdn Bhd sued the plaintiff, it was sometime in the year 2003 vide Ipoh High Court Suit No 22–4 of 2003 whereby the said claimed is for damages amounting to RM1,589,984.90. This is consistent with cl 4.02 of the policy which defines the word claim 'shall mean the demand for compensation made by a third party against the Insured'. There was no other evidence adduced by the plaintiff for the demand for compensation made by Aneka Seloka Sdn Bhd (the third party) against him except this Ipoh High Court Suit No 22–4 of 2003.

[48] The plaintiff, through their solicitor, Messrs Ooi & Assoc, then served the writ of summons and statement of claim on the defendant on 17 March 2003. The letter evidencing this is found at p 327 Bundle B.

[49] The service of the writ of summons and statement of claim on the defendant was on 17 March 2003 which triggers the defendant's liability or the obligation on the defendant to defend a claim on an insured's behalf. Thus, the defendant was put at risk at this time and cause of action began to run from 17 March 2003.

[50] The plaintiff had filed this suit against the defendant on 25 January 2013.

[51] Section 6 of the Limitation Act 1953 provides that:

Save as hereinafter provided the following actions shall not be brought after the expiration of six years from the date of which the cause of action accrued, that is to say —

(a) actions founded on contract or on tort.

[52] The plaintiff had filed this tort action against the defendant over a period of six years starting from 2003. As such, the plaintiff had filed this action in contravention of the provision of s 6 above.

[53] So, it is my considered opinion that, the plaintiff is barred by the Limitation Act 1953 to claim against the defendant. Hence, the plaintiff's claim against the defendant is dismissed with costs of RM20,000.

Plaintiff's claim dismissed with costs of RM20,000.

Reported by Kanesh Sundrum